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No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM H. KENNER,
ESTATE OF ELEANOR V. KENNER, Deceased, and
KENNER'S CHARITABLE HOSPITAL, INC., a not-for-profit, Illinois corporation,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Reply Argument	1
1. Reply to Item 1, of Respondent's Argument	1
2. Reply to Item 2, of Respondent's Argument	5
3. Reply to Item 3, of Respondent's Argument	7
4. Items of Great Moment Stressed in Petition For A Writ of Certiorari But Not Controverted By Respondent	9

CITATIONS

Cases

Chicago Title & Trust Co. v. Fox Theatres Corp., 182 F. Supp. 18	2, 8
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238	2
Kenner v. Commissioner, U.S. Ct. App., 7 Cir., No. 16,008	7
Noland Bros., Inc. v. U.S. for use of Fox Bros. Constr. Co., 266 F.2d 143	2
Root Refining Co. v. Universal Products Co., 169 F.2d 514	2
U. S. v. Gill, 156 F. Supp. 955	2
U. S. v. Glasser, C.C.A. Ill., 116 F. 2d 690, 691	2

Statutes

28 U.S.C.A., Rules of Civil Procedure, Rule 9(b)	2

Miscellaneous

7 Moore's Federal Practice, Sec. 60.33	2

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REPLY ARGUMENT

In reply to respondent's Argument, petitioners state that the decision of the court below is incorrect. There is a clear head-on conflict of decisions warranting review by this Court.

1. In specific reply to item 1 of respondent's Argument (Res. 2, 3, 4), petitioners state the following:

The authorities cited by respondent (Res. 3, 4) are the same as some of those excellent authorities cited by peti-

tioners (Pet. 3, 4, 5, 16, 18, 19), such as *Hazel-Atlas Co.* v. *Hartford Co.*, 322 US 238; *Root Refining Co.*, v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), 7 Moore's Federal Practice (2d ed) 510, Sec. 60.33; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 182 F. Supp. 18 (S.D.N.Y.); and Rule 9 (b), Fed. Rules Civ. Proc. Petitioners agree with the definition of fraud practiced on the court as stated in note 2, in respondent's Argument (Res. 3, n.2). All of these authorities support petitioners' case, on all fours. It is most obvious that petitioners have met the standards of specificity of particularity required.

It should be noted, however, that respondent has conveniently ignored the case cited by petitioners (Pet. 19) of *Noland Bros., Inc.* v. *U. S. for use of Fox Bros.*, 266 Fed. 2d 143, citing Rule 9 (b), on page 143, as follows:

> "* * * and Federal Rule does not require express allegation of 'fraud' but, instead, merely requires that the circumstances constituting fraud shall be pleaded with particularity. Fed. Rules Civ. Prac. rule 9 (b) 28 USCA."

Respondent has also completely ignored another case, cited by petitioners, regarding the requirements of Rule 9 (b) (Pet. 20), the citation of *U. S.* v. *Gill*, D. C. Pa. (1957), 156 F. Supp. 955, where it was held as follows:

> "* * * but all that is required is that the circumstances constituting the alleged fraud be pleaded with sufficient definiteness to advise the adversary of the claim which he must meet."

Furthermore, it should be noted that respondent has been significantly silent about petitioners' charge of *conspiracy* to practice a fraud on the court, which silence is tantamount to admission thereof. Such conspiracy has been thoroughly established by particularized related facts

and circumstances and clearly apparent when viewed either separately or together. In *U. S.* v. *Glasser,* C.C.A. Ill., 116 F. 2d 690, 691, it was held that:

> "A '*conspiracy*' is usually established by a number of apparently disconnected circumstances which when taken together throw light on whether the accused have an understanding and are in common agreement." (Emphasis supplied)

The record herein is manifestly replete with basic particularized facts in support of petitioners' allegations of fraud practiced on the court. Any ordinary prudent person could not help but fully conclude, without any doubt in his mind, that petitioners were relieved of their property with a value in excess of $2,078,000, by a poorly concealed conspiracy of deceit and fraud practiced upon the court. Petitioners have shown the formation of a conspiracy, connecting their own attorneys, respondent, and the court with it; the performance of acts by them in furtherance thereof; damage to petitioners as a consequence of such action; and the intent to damage petitioners.

It has been established by uncontroverted facts that the conspirators have defiled the Temple Of Justice by debauching the power of adjudication, with disdain and impunity.

In light of the foregoing facts it is idle for respondent to belabor its fantasy that there is no "causal nexus between the misconduct charged and the integrity of the judicial decision rendered." (Res. 4)

Petitioners' original petition in the Tax Court, which was appealed to the U. S. Court of Appeals and which is at issue here, charged an "*unconscionable corrupt con-*

spiracy'' over an extended period of about 18 years to practice a fraud upon the court to shake-down petitioners for $60,000 by Internal Revenue Agent George Templer and because petitioners did not pay the $60,000, but instead, reported the attempted extortion, the petitioners' property was confiscated without any pretext of due process or equal protection of the law or any court action. The conspiracy is particularized in the 24 page petition ''lodged'' in the Tax Court. Among other particulars, it discloses a chain of overt acts to accomplish the conspiratorial purpose; how George Templer attempted the extortion; that the then Regional Director of the IRS, Mr. Sauber, was indicted for fraud; how Chief Counsel for petitioners, John Potts Barnes, practiced a fraud on the court by also acting as Chief Counsel for the Internal Revenue Service, for which he demanded and received a $5,107.50 ''fee'' from petitioners, in addition to a salary from the Internal Revenue Service; how Joe Rae and his attorney, Klipstine, participated in purloining petitioners' $2,000,000 real estate for the paltry sum of $750,000 by making an insignificant down payment, the balance of which remains still unpaid even though the present is many years later; that petitioners' ''attorneys'', Warren L. Schmidt and James F. Slager, signed a corrupt ''Agreed Order'', purportedly liabling petitioners for about one-half million dollars tax which they do not owe; and the obvious abnegation of Tax Court Judge Mulroney who abnegated his judicial function.

The foregoing facts firmly establish that the court has been defiled as the product of an unconscionable scheme or plot to influence improperly the decision of the court, there was an attack on the institution of the court itself so that it could not adjudicate impartially. Attorneys Klipstine and John Potts Barnes were employed to exert

improper influence on the court; petitioners' own "attorneys" were involved in the fraud of their clients, all of which falls squarely within the definition of fraud upon the court supplied by respondent (Res. 3, n 2).

2. In specific reply to item 2 of respondent's Argument (Res. 4), petitioners represent to the Court as follows:

Tested by all of the foregoing principles, the decision of the court below is clearly erroneous. In light of the conspiracy that started in 1950, and has not yet abated, no additional "causal nexus" (Res. 4) is necessary "between the misconduct charged and the integrity of the judicial decision rendered." The said petition, here in issue, relates a chain of overt progressive illegal acts, constituting the corrupt conspiracy from its inception in 1950 to the rendering of the decision and subsequent thereto. It is therefore futile for respondent to erroneously contend that there is a "complete absence of any suggestion as to how this incident could have tainted with fraud the proceedings in the Tax Court eleven years later" (Res. 4).

The misbehavior of John Potts was unconscionable; he was Chief Counsel for both petitioners and respondent, at the same time; he personally and actively processed the case against petitioners and during which process, on one occasion, he personally confronted petitioners in the Internal Revenue Building, Washington, D. C., at a scheduled hearing on the case.

The conspiracy is obviously a barrel of corruption. John Potts Barnes is part of it; he has contributed heavily to it, and the indulgence by respondent in a rank form of sophistry, to twist the truth, to change or convert, as if by magic, the documented indisputable substantial material

particularized facts of fraud practiced on the court by Barnes does not tend, in the slightest, to absolve him of his misbehavior and make him smell like a rose.

He testified in the Tax Court before Judge Mulroney, where the Judge's immediate attitude toward petitioner, William H. Kenner, was highly sarcastic, oppressive, suppressive and intimidating; whereas, the Judge's attitude toward John Potts Barnes, on the contrary, was to the other extreme—overly friendly, who recessed the court immediately upon Barnes being excused as a witness, to visit with him in Chambers. Such unrefuted illegal overt acts of the Judge clearly indicate that the Judge abnegated his judicial function.

At this late date, it is too late to claim, *for the first time,* that, "The letter petitioners claim was written by Barnes as Chief Counsel has never been found to exist" (Res. 5, n 4).

In light of Barnes' having served as Chief Counsel for both petitioners and for the IRS, at the same time, and having personally appeared at a hearing to process the case, it is to no avail for respondent to now argue that. " • • • the signing of Barnes' name was the routine act of a subordinate in Regional Counsel's Office in Chicago, • • •"

It is likewise too late now, *for the first time,* to allege, "that the Department of Justice has been informed that the Inspection Division of the Internal Revenue Service, which reports directly to the Commissioner, investigated both the alleged bribe offer and charges against Barnes in 1958" (Res. 5, n 4). Furthermore, just because the Department of Justice was allegedly "informed" does not clothe the allegation with credence.

It is also significant to note that, *for the first time,* in respondent's "Brief For The Respondent", in the U. S. Court of Appeals, 7 Cir., *Kenner* v. *Commissioner,* No. 16,008, which is the case on appeal here, respondent has offered the belated alibi that:

> "It concluded that the $60,000 'bribe' offer was, in reality, a written compromise proposal presented to petitioner to set his tax liability at $60,542.85 for the years 1944-1948. Mr. Barnes was also cleared of any impropriety in accepting a fee while Chief Counsel for professional work done for the petitioners prior to his appointment" (Res. 5, n 4).

Since the foregoing quotation appeared in said brief, filed on 6-5-67, petitioners have not been successful in obtaining a copy of the alleged "written compromise", all of which indicates that the "written compromise" is nothing more than a belated rash fabrication to alibi an attempted extortion, the first link in the corrupt conspiracy to practice a fraud upon the court.

The only "professional work done" was the letter written by Barnes to respondent that petitioners owe no tax, and thereafter another letter reversing the position taken in the first letter. Of course, Barnes processed the case against petitioners which, no doubt, in reality, constitutes the "professional work done".

3. In specific reply to item 3 of respondent's Argument (Res. 5, 6), petitioners represent to the Court as follows:

Respondent erroneously states that the court below acted properly in not permitting petitioners to amend, as follows:

> "In the absence of showing * * * that amendment would cure the deficiencies, * * *"

Such showing was made as indicated by the following paragraph quoted from page 19 of Reply Brief For Petitioners, in the U. S. Court of Appeals:

> " 'The last paragraph of Respondent's Brief, page 35, suggests additional specifics of fraud at this phase of the litigation, which petitioners feel is not necessary in light of a preponderance of evidence already presented but, because of the suggestion, and if the court deems it necessary, petitioners move for leave of Court to submit "Additional Affidavits, tendered herewith."

In addition to the foregoing, petitioners made a formal motion for leave of court to file said affidavits, which motion was denied even though respondent had informed the court that it had no objection to the motion.

The Additional Affidavits, received by the court on July 19, 1967, but not considered filed, contained the following particularized facts of fraud practiced on the court:

Attorney Cass Practiced Fraud On The Court, p. 2.

Abnegation Of The Trial Judge Of His Judicial Function, p. 4.

"Attorney" Houston Practiced Fraud On The Court, p. 6.

Attorney John Potts Barnes Practiced Fraud On The Court, p. 7.

Solicitation Of $60,000 Bribe By Agent Templer In Lieu of $2,078,000 "Tax", p. 9.

In the U. S. Court of Appeals, in Brief For The Respondent, p. 35, respondent stated that there is precedent to amend pleadings and cited *Chicago Title & Trust Co. v. Fox Theatres Corp., supra,* however, in respondent's instant Argument (Res. 6, n 5), a contrary stance is taken,

this time declaring that the Chicago Title case does not apply because "an unsavory atmosphere prevaded". On the contrary, that case is in point since in the instant case there also prevades an unsavory atmosphere; yet there is a striking difference in the Chicago Title case, where neither the government nor the courts suppressed a mass of evidence of fraud practiced on the court, as was done in the Tax Court and in the U. S. Court of Appeals, in the instant case.

It is shocking and incredible that the courts suppress such a glaring, scandalous and huge corrupt mass of fraud practiced on the court, instead of purging it promptly from its records; the Tax Court even refused to order respondent to produce its pertinent records of corruption of which respondent has exclusive hostile control; the courts also denied an investigation!

The Tax Court erroneously claimed that it had no jurisdiction to purge its records of fraud practiced on the court.

The Court of Appeals held that the Tax Court does have jurisdiction but, that the obvious huge mass of corrupt fraud practiced on the court, brought to its attention, does not add up to fraud practiced on the court.

Such a decision is clearly erroneous and incredible!

4. It should be noted that respondent did not controvert the following items of great moment stressed in the Petition For A Writ Of Certiorari, which items should therefore be considered admitted by respondent:

Summary Of Argument, paragraph 1 (Pet. 7)

1. The Bludgeoning of Petitioners (Pet. 8)

2. Death and Destruction of Petitioners (Pet. 9)

3. Sinister Machinations of Corrupt Officials Is "Standard Practice" According to Respondent (Pet. 9)

4. Existing Judgment Encourages a Scourge of Other Extortions (Pet. 12)

5. Petition To Investigate Fraud Practiced on the Court Was Ignored by the Tax Court (Pet. 12)

7. Fraud on the Court Is Gross, Brazen, Notorious and Shocking (Pet. 13)

9. John Potts Barnes Acted As Chief Counsel for Both Petitioners and Respondent at the Same Time (Pet. 13)

10. Tax Court Judge Mulroney Abnegated Judicial Function (Pet. 14)

11. Fraud Practiced on Court—Barnes Gets $5,107 Sham Fee (Pet. 15)

12. Facts Impose Upon Court Duty To Grant Petition (Pet. 16)

13. Court of Appeals Suppressed Additional Particulars of Fraud Practiced on the Court (Pet. 16)

14. Suppression by Court of Appeals of Evidence of Fraud Is in Itself "Legal" Fraud on Court (Pet. 18)

15. Other Suppressed Evidence of Fraud Is in Hostile Exclusive Control of Respondent (Pet. 18)

16. Fraud on the Courts Should Not Be Condoned

17. Judgments Should Be Set Aside Irrespective of Merits of Claim (Pet. 19)

If the evidence of fraud particularized in the case at bar does not add up to fraud practiced on the court, no evidence ever did.

If any case ever required an investigation, this one surely does.

The Tax Court decision to "lodge" the Petition, and the U. S. Court of Appeals' decision to affirm the Tax Court, grounded on nothing but the $60,000 shake-down extortion attempt, and on Barnes' notorious work on both sides of the street, should be purged from the court record, forthwith.

Respectfully submitted,

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MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

Come now petitioners, Kenner Charitable Hospital, Inc., a not for profit, Illinois corporation, estate of Eleanor V. Kenner, deceased, and William H. Kenner, and move this Honorable Court for a reconsideration of its denial on October 14, 1968 of Petition of Writ of Certiorari, on the following grounds:

1. The pathetic plight in which the judgment has placed Kenner's Charitable Hospital, Inc., a not for profit, Illinois corporation and its other two victims has terrifying implications to not only them but also to every taxpayer and prospective taxpayer of the United States. It is a reflec-